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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10

11 STRAUS FAMILY CREAMERY, et)
12 al.,)
13 Plaintiffs,)
14 v.)
15 WILLIAM B. LYONS,)
16 Defendant.)
_____)

No. C02-1996 BZ

**ORDER DENYING MOTION TO
TRANSFER**

17 Before the court is defendant's motion to transfer this
18 matter to the Eastern District of California, Sacramento
19 Division, pursuant to 28 U.S.C. § 1404(a).¹ Section 1404(a)
20 states that "[f]or the convenience of parties and witnesses,
21 in the interest of justice, a district court may transfer any
22 civil action to any other district or division where it might
23 have been brought." 28 U.S.C. § 1404(a). Factors considered
24 in making this determination include:

25 (1) plaintiff's choice of forum, (2) convenience of
26 the parties, (3) convenience of the witnesses,

27 ¹ The parties have consented to the jurisdiction of a
28 United States Magistrate Judge for all proceedings including
entry of final judgment pursuant to 28 U.S.C. § 636(c).

1 (4) ease of access to the evidence, (5) familiarity
2 of each forum with the applicable law, (6)
3 feasibility of consolidation of other claims, (7)
4 any local interest in the controversy, and (8) the
5 relative court congestion and time of trial in each
6 forum.

7 Royal Queentex Enter. Inc. v. Sara Lee Corp., 2000 WL 246599
8 at *2 (N.D. Cal. Mar. 1, 2000)(citations omitted).

9 Defendant argues that this action could have been brought
10 in the Eastern District, and that transferring this action
11 would make it more convenient for defendant's witnesses and
12 provide easier access to relevant evidence. Defendant also
13 argues that judicial economy would be promoted because Judge
14 Garland Burrell of the Eastern District is familiar with the
15 milk pooling regulatory scheme from a previous case.

16 Plaintiffs do not dispute that this action could have been
17 brought in the Eastern District. Rather, plaintiffs argue
18 that in light of the strong presumption favoring plaintiff's
19 choice of forum see Decker Coal Co. v. Commonwealth Edison
20 Co., 805 F.2d 834, 843 (9th Cir. 1986); Royal Queentex Enter.
21 Inc., 2000 WL 246599 at *2-3, the convenience to the parties
22 and witnesses, access to proof and judicial economy all weigh
23 in plaintiffs' favor.

24 Wherever this action is tried, someone will be
25 inconvenienced. Plaintiffs have filed declarations that
26 plaintiff Straus is a small family business located in Marin
27 County and that plaintiff Horizon, a Colorado corporation,
28 does a substantial portion of its business in the Bay Area and
regularly has representatives come to San Francisco.
Plaintiffs also aver that most of their witnesses will be

1 representatives of other small organic dairies in Marin or
2 Sonoma County, that their documents are similarly located and
3 that their counsel is in Marin. Defendant produced a longer
4 list of potential witnesses, most of whom are either employed
5 by defendant or are expert witnesses. Most of defendant's
6 witnesses are located in the greater Sacramento area and
7 defendant's documents are located in Sacramento. Neither side
8 will be terribly inconvenienced, since Sacramento and San
9 Francisco are only 90 miles apart. Since no witness actually
10 lives in San Francisco and only three appear to actually live
11 in Sacramento, almost everyone will have to travel somewhere.
12 The question then is whether the inconvenience to the
13 defendant is significantly greater than the inconvenience to
14 the plaintiffs so as to outweigh the respect I must accord
15 plaintiffs' choice of forum.

16 Section 401 of the California Code of Civil Procedure,
17 the exception to California's general venue rule when the
18 defendant is the State or an agency of the State, states in
19 relevant part:

20 Whenever it is provided by any law of this State
21 that an action or proceeding against the State or a
22 department, institution, board, commission, bureau,
23 officer or other agency thereof shall or may be
24 commenced in, tried in, or removed to the County of
Sacramento, the same may be commenced and tried in
any city or city and county of this State in which
the Attorney General has an office.

25 Cal. Civ. Proc. Code § 401(1)(Deering 1991). This section
26 applies "when the normal rules of venue allow trial [in
27 Sacramento County], as when the 'residence' of the agency is
28 in Sacramento." Regents of the Univ. of Cal. v. Superior

1 Court, 3 Cal. 3d 529, 535 (1970). See also Harris v.
2 Alcoholic Beverage Control Appeals Bd., 197 Cal. App. 2d 759,
3 767 (1961). It also applies regardless of "whether the
4 defendant agency is represented by the Attorney General or its
5 own counsel." Harris, 197 Cal. App. 2d at 767.

6 The purpose of § 401 and related statutes governing venue
7 in actions against state agencies "is to afford to the citizen
8 a forum that is not so distant and remote that access to it is
9 impractical and expensive. To that end, such provisions
10 should be liberally construed in favor of the private
11 litigant." Regents of the Univ. of Cal., 3 Cal. 3d at 536.
12 The California State Bar Committee on Administration of
13 Justice, in recommending the enactment of § 401, stated that
14 "it is a severe financial hardship to require litigants to
15 have their cases tried at Sacramento. Certainly as between
16 the State and the individual, the State should and can afford
17 any added expense involved." Id. at 537 (quoting Comm. on
18 Admin. of Justice, 1945-46, Annual Report, 21 State Bar J. at
19 161, 180 (1946)). While § 401 is a state venue rule, at the
20 very least it amounts to a determination by the California
21 legislature that its state agencies will not be unduly
22 inconvenienced if required to defend actions away from
23 Sacramento, in locations where the Attorney General is
24 officed. Indeed, defendant has in the past defended the milk
25 regulatory scheme in Los Angeles and Riverside.²

26
27 ² See Ray v. Parker, 15 Cal. 2d 275 (1940); Jersey Maid
28 Milk Prod. Co. v. Brock, 13 Cal. 2d 620 (1939); Golden Cheese
Co. v. Voss, 230 Cal. App. 3d 547 (1991).

1 Defendant has also failed to persuade me that all the
2 witnesses that defendant proposes to call will be needed. A
3 review of the pleadings suggests that legal disputes are
4 likely to dominate over factual disputes, a point which
5 neither party seriously disputed during argument. The parties
6 estimate that the trial will take five days, which suggests
7 that they realistically do not expect to call all their
8 proposed witnesses. And as noted below, Judge Burrell decided
9 his case on summary judgment.

10 Finally, I find that the burden venue will create can be
11 better borne by defendant's employees and experts than by
12 small dairy farmers, such as Straus and plaintiffs' witnesses.

13 Defendant also argues that a transfer to Sacramento would
14 promote judicial economy because it could result in the
15 assignment of this matter to Judge Burrell, who some years ago
16 presided over a lawsuit challenging a different portion of the
17 milk pooling regulations. I need not decide whether defendant
18 is judge shopping, as plaintiffs complain. Suffice it to say
19 that defendant has failed to establish that this matter would
20 be reassigned to Judge Burrell or that Judge Burrell has such
21 substantial experience with the milk pooling regulations that
22 it would promote judicial economy for him to preside over the
23 matter. I note that Judge Burrell decided his case on summary
24 judgment in 1999. There is no indication in the record that
25 he ever engrossed himself in the many matters alluded to in
26 defendant's brief.

27 Balancing all these factors, I find that the
28 inconvenience to plaintiffs if this matter were transferred to

1 Sacramento would substantially outweigh the inconvenience to
2 defendant if this matter remains in San Francisco.

3 Accordingly, **IT IS HEREBY ORDERED** that defendant's motion to
4 transfer is **DENIED**.

5 Dated: September 6, 2002

6
7 /s/ Bernard Zimmerman

Bernard Zimmerman
United States Magistrate Judge